

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 25, 2001

STATE OF TENNESSEE v. JOHN PAUL SZCZEPANOWSKI

Direct Appeal from the Criminal Court for Knox County
No. 66863 Ray L. Jenkins, Judge

No. E2000-03124-CCA-R3-CD
June 24, 2002

The Knox County Grand Jury indicted the Defendant for assault, official misconduct, and official oppression. A Knox County jury convicted the Defendant of official misconduct, and a mistrial was declared as to the remaining two counts. The Defendant now appeals his conviction, arguing the following: (1) that Tennessee Code Annotated § 39-16-402(a)(1), governing the crime of official misconduct, is unconstitutionally vague; (2) that insufficient evidence was presented at trial to support his conviction; (3) that the trial court erred by refusing to order the State to specifically describe in the bill of particulars the act committed by the Defendant underlying the charged offense or in the alternative, to require the State to elect the offense upon which it was relying to establish the crime of official misconduct; and (4) that the trial court erred in instructing the jury. We conclude that Tennessee Code Annotated § 39-16-402(a)(1) is not unconstitutionally vague; that sufficient evidence supports the Defendant's conviction; that the trial court did not err by refusing to require the State to clarify its bill of particulars or to elect an offense at the close of proof; and that the trial court did not err in its jury instructions. We therefore affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the Appellant, John Paul Szczepanowski.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Robert L. Jolley, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In November 1998, the Knox County Grand Jury indicted the Defendant, John Paul Szczepanowski, for assault, official misconduct, and official oppression. Following a trial, a Knox

County jury convicted the Defendant of official misconduct, a Class E felony, and a mistrial was declared as to the remaining two counts after the jury was unable to reach verdicts as to these counts. The trial court sentenced the Defendant as a Range I, standard offender to two years, to be served on probation. The Defendant now appeals his conviction. He presents the following issues for our review: (1) whether Tennessee Code Annotated § 39-16-402(a)(1), governing the crime of official misconduct, is unconstitutionally vague; (2) whether sufficient evidence was presented at trial to support his conviction; (3) whether the trial court erred by refusing to order the State to specifically describe in the bill of particulars the act committed by the Defendant underlying the charged offense or in the alternative, to require the State to elect the offense upon which it was relying to establish the crime of official misconduct; and (4) whether the trial court erred in instructing the jury. Having thoroughly reviewed the record, we affirm the judgment of the trial court.

The charges in this case stem from the arrest of Jack J. Longmire on December 14, 1997, in which the Defendant, a Knoxville police officer at the time of the arrest, participated. At trial, Jack Longmire, the victim in this case, testified that in December 1997, he was living with his former wife in an apartment complex in Knoxville. He recalled that on an early Sunday afternoon, he was walking from a trash dumpster back to his apartment when two police vehicles and a vehicle driven by his wife pulled into the apartment complex. The victim testified that two police officers, Officer Toby Wells and Officer Robert Taylor, got out of the cars and told him that he was under arrest for domestic violence. The victim stated that he had started to put his hands behind his back and that Officer Wells had placed a handcuff on one of his wrists when the victim said, "Wait a minute." He claimed that he hesitated because he "was getting ready to go to work." The victim denied that he was resisting arrest and maintained that after he initially hesitated, he began telling the officers to handcuff him. The victim reported that the officers then "grabbed [him] and pushed [him] forward . . . face first" onto the hood of his wife's car. According to the victim, Officer Taylor next said, "[H]e's trying to get my gun" and sprayed him with pepper spray.

The officers finished handcuffing the victim, placing his arms behind his back, and began to walk him behind his wife's car. The victim claimed that Officer Wells was holding "some kind of stick or a flashlight" to his throat, and he stated that as they walked around the car, Officer Taylor hit him in the stomach "a couple of times." The victim reported that Officer Taylor asked him, "[W]hy did you kick your wife? . . . Why . . . did you beat your wife like that?" According to the victim, the officers told him to lie on the ground on his stomach with his hands still in handcuffs behind his back. The victim reported that Officer Wells then kicked him "in the head" a few times, grabbed him by his hair, and hit him in the right eye. He stated that he was also "kicked in the groin a couple of times" and in "the stomach, the side" a couple of times.

The victim testified that five to ten minutes later, while he was lying in the parking lot handcuffed, another police car entered the apartment complex and pulled to a stop approximately three feet from him. The Defendant got out of the car. The victim stated that he heard one of the officers say to the Defendant, "Careful, . . . we don't want to see our friend get hurt here," and the victim recalled that the officers began to talk about "what they claimed [the victim] had done." The victim reported that the Defendant then grabbed the back of his sweatshirt and pulled him into a

kneeling position, choking him in the process. The victim stated that he was “gasping for air” and thought that he “was going to pass out.” He testified that the Defendant, while standing behind him and choking him, asked him “why don’t [sic] [you] fight a man.” The victim stated that when the Defendant released him, he fell back onto his stomach, and the Defendant “proceeded to kick [him] . . . in the head.” He estimated that the Defendant kicked his head eight to ten times while he attempted to “dodge” the kicks. The victim testified that his head was “bouncing off the concrete,” and he reported that at some point, he hit his head on the bumper of the Defendant’s police vehicle. He testified that he began to bleed profusely as a result of the kicks.

The victim testified that during the incident, a police officer who lived in his apartment complex approached the other officers and asked what was happening. The victim stated that he could not hear the discussion that subsequently took place between the officers. He testified that soon, however, Sergeant Dick Taylor arrived at the scene and told the other officers to “get him up.” The victim testified that after he stood up, the victim asked the Defendant his name, and the Defendant told him his name. The victim reported that the Defendant said, “You have a problem with that?” and the victim shook his head. He testified that the Defendant then approached him and said, “On your knees, bitch.” The victim stated that he called for Sergeant Taylor, saying, “They’re going to beat the hell out of me again.” The victim testified that the officers next took him “to the paddy wagon . . . [and] clean[ed] [him] up” before sending him to the hospital. The victim reported that he received nine staples to his head wound at the hospital.

The victim testified that he later made a complaint with “Internal Affairs.” The victim stated that “Internal Affairs” took photographs of his wounds, and these photographs were entered into evidence at trial. The victim reported that he sued the City of Knoxville and received \$38,000 in compensation stemming from his arrest. He also testified that he was found not guilty of domestic assault.

On cross-examination, the victim denied that he hit his wife prior to the arrival of the officers on December 14, 1997. He claimed that his wife called police because she was “jealous” and because she “got mad at [him] over something.” However, he admitted that he and his wife had participated in a physical “struggle.”

The victim further testified that Officer Taylor brought charges against him for resisting arrest, but he reported that the trial judge had “dropped” the charges after conducting a hearing on the matter. When asked how Officer Taylor may have injured his wrist during his arrest of the victim, the victim replied, “He possibly hit me or something.” The victim denied that he and Officer Taylor had fallen to the ground together during the arrest. He also denied that he had resisted arrest or attempted to take Officer Taylor’s gun. The victim recalled that during his arrest, Officer Taylor pressed an emergency button to request additional assistance.

Kelly Longmire, the Defendant’s former wife, testified that she spent the night of December 13, 1997 in a shelter after a confrontation with the victim. She testified that she swore out a warrant against her husband and asked for a police escort to her home the following day to collect personal

items. She stated that she spoke with Officer Taylor, the Defendant, and another police officer, possibly Officer Wells, prior to returning to her apartment. She testified that the officers were able to see her injuries at the time. She reported that she told them that prior to beating her, her husband said that “he could beat the sh_t out of [her] and the police wouldn’t do a damn thing about it.”

Kelly Longmire testified that when she and the officers arrived at the apartment complex, the officers confronted her husband in the parking lot and told him that he was under arrest. She recalled that he said, “Wait a minute” and “jerked his arm back,” but then began to say, “Here’s my hand, handcuff me . . .” At this point, according to Ms. Longmire, the officers “pushed [the victim] up against [her] car.” Ms. Longmire testified that Officer Taylor said, “He’s . . . going for my gun” and radioed for help. She stated that Officer Taylor then hit the victim in the head, sprayed him in the face with pepper spray, and handcuffed him. According to Kelly Longmire, Officer Taylor passed the victim to Officer Wells, and Wells “felt [the victim’s] cro[t]ch.” Ms. Longmire explained, “I think he was feeling for weapons.” She testified that her husband then asked Wells “if he enjoyed that,” and Wells pushed her husband to the ground. She reported that Wells also kicked her husband before placing him behind a police vehicle.

Kelly Longmire stated that other officers, including the Defendant, soon arrived at the scene. She stated that she was “90 percent” positive that her husband was sitting down on the ground behind her car when the additional officers arrived. She testified that the Defendant asked her husband why he hit and kicked his wife, and the victim replied, “I didn’t hit her.” Kelly Longmire reported that the Defendant then kicked her husband and told him that he was “a sorry piece of sh_t.” She testified, “And then a bunch of policeman were up there, and I heard noises, and it sounded like an egg cracking or something.” She stated, “I know [the Defendant] kicked him . . . once or twice, maybe three times, and then I don’t know who was kicking him after that. All the police officers were back behind my car at the time, and I don’t know who was doing what.” Kelly Longmire stated that her husband was not bleeding until all of the police officers arrived. Longmire recalled that a man who lived in her apartment complex then approached the group of officers and asked what was happening.

Kelly Longmire testified that after the incident, she told Sergeant Taylor that she saw an officer kick her husband. However, she stated that she was unable to identify the officer at the time because the Defendant had already left the scene. She also testified that after the incident, she planned to take pictures of blood left at the scene to verify what she had seen, but two of the officers cleaned up the blood before she was able to do so.

On cross-examination, Kelly Longmire testified that she divorced the victim approximately a year after the incident. She stated that she was afraid of her husband. She also testified that he beat her on December 14, 1997.¹ She reported that her husband was intoxicated and that he “got drunk”

¹ On cross-examination, Kelly Longmire was asked if her husband beat her on December 14, 1997, and she stated that he had. She also testified on direct examination that she spent the night of December 13, 1997 in a shelter.

(continued...)

because “[h]e was mad . . . Peyton Manning lost the Heisman Trophy.” Ms. Longmire testified that she was also “upset” because her husband was “flirting with [her] girlfriend.” She described the scene as follows: “We were sitting in bed. He got on top of me and started shaking me. I grabbed for the phone, and he jerked it out of the wall. I tried to go in my son’s room. He came at me. I scratched him. And then he started trying to leave, and I kicked him in the balls, and he kicked me in the jaw.” Longmire reported that after their struggle, she attempted to take pictures of her injuries to document them, but her husband broke her camera. She stated that she then called the police, and while she called the police, her husband left their apartment. She testified that she later drove herself to the hospital.

Kelly Longmire admitted on cross-examination that she did not have a good view of the Defendant during the incident that resulted in the charges in this case. Nonetheless, she maintained that she could tell the Defendant was kicking her husband because she could see the Defendant’s shoulders and because she heard noises. However, she admitted that she did not actually see the Defendant make physical contact with her husband.

Roger Millwood, an emergency physician at Baptist Hospital, testified that he treated the victim on December 14, 1997. Millwood testified that the victim “came in with injuries sustained during an arrest.” He reported that the victim had sustained a laceration of the right side of his head, which measured slightly over an inch and a half in length; a couple of bruises; and an injury to his crotch. Millwood stated that the only injury that required medical attention was the laceration, which he “stapled” closed after cleaning it and administering a local anesthetic. According to Dr. Millwood, the victim reported that he had hit his head on concrete and that he had been kicked in the crotch. On cross-examination, Millwood stated that it did not appear that the victim had been kicked in the head ten to fifteen times.

Officer Toby Allen Wells testified that in 1997, he was employed as a patrol officer for the Knoxville Police Department. Wells reported that on December 14, 1997, he met Officer Robert Taylor and other officers at a Texaco station to serve a warrant on the victim. He stated that Kelly Longmire, whose face was red and swollen, was also present at the gas station. Wells testified that he and Officer Taylor escorted Kelly Longmire to her apartment complex, where they spotted the victim in the parking lot. Wells testified that Officer Taylor approached the victim and told him that he had a warrant for his arrest. Wells maintained that the victim assumed “a very aggressive posture,” clenching his fists to his sides “as if he was ready to fight.” Wells reported that at this point, he grabbed the victim’s left arm, Officer Taylor attempted to “grab the right side of [the victim’s] body,” and they tried to push the victim onto the hood of Kelly Longmire’s car. Wells explained that officers are trained to put individuals who resist arrest on the hood of a car.

¹(...continued)

It is unclear from the record whether the confrontation between Jack and Kelly Longmire which Kelly Longmire described through her testimony took place on December 13, December 14, or on both days.

Wells testified that during the struggle, Officer Taylor began to scream that the victim was trying to grab Taylor's gun. Wells stated that he responded by spraying the victim with pepper spray, and he recalled that Taylor also sprayed the victim with pepper spray. Wells testified that during the struggle to handcuff the victim, he "used closed-fist strikes to [the victim's] lower kidney area, . . . trying to get him to comply and give [the officers] his hands." He also stated that Officer Taylor hit the victim in the "upper body area," possibly on the side of his face, while trying to handcuff him. Wells stated that he and Taylor were eventually able to handcuff the victim after spraying him with pepper spray. Wells denied that he or Taylor used any force against the victim after he was handcuffed. He also denied ever kicking the victim.

Wells testified that once the victim was handcuffed, he "pat[ted] [the victim] down" to ascertain whether the victim was armed, and he stated that while doing so, he checked the victim's crotch area for weapons. Wells and Taylor then walked the victim behind Kelly Longmire's car and "sat him down." Wells stated that the victim was "sitting . . . on his tail . . . , with his knees up and bent with his hands behind his back." Wells further testified that Officer Taylor told him that he had pressed an emergency button to request help during the arrest, but they later cancelled the call.

Wells testified that the Defendant arrived at the scene after the victim was subdued and handcuffed. He reported that the Defendant pulled his car up approximately twelve feet behind Kelly Longmire's car and approached the victim. Wells testified that the Defendant first "kicked [the victim] in the groin." He described this as an "illegal" act and explained that it was illegal because the victim was already handcuffed. Wells stated that at this point, the victim was not bleeding and did not appear to be injured, except that his eyes were swollen, presumably as a result of the pepper spray. Wells stated that after seeing the Defendant kick the victim, he picked up the pepper spray containers and a magazine for Officer Taylor's weapon which had landed on the ground during the struggle with the victim. He testified that as he was putting the items in his vehicle, he heard the Defendant call for an ambulance. Wells stated, "At that point, I knew something was wrong, because the man wasn't injured." He testified that he walked back to where the victim had been sitting and saw the victim lying in a pool of blood with his hands still handcuffed behind his back. He stated that he saw a "gap" at the victim's hairline and "a big blood mark coming across his face like a hockey stick." Wells recalled that he "was in disbelief."

Wells testified that Sergeant Taylor soon arrived at the scene. According to Wells, the victim told Sergeant Taylor that Wells had sprayed him with pepper spray and that the Defendant was "the one that beat the hell out of [him] while he was handcuffed." Sergeant Taylor attended to the victim's wounds while other officers arrived at the scene. Wells reported that the Defendant and the victim had another confrontation before the victim was transported from the scene. Wells stated that the Defendant told the victim "he would make him get on his knees, bitch," and other officers then separated the Defendant from the victim.

On cross-examination, Wells stated that the victim was "violent" during the arrest before being handcuffed. He explained, "[W]hen he was asked to put his hands behind his back, . . . he refused to do so. . . . [W]hen he put his hands behind his back, he took a very aggressive posture. .

.. He did not want to go into custody.” Wells denied that the victim and Officer Taylor fell to the ground or into the car during the arrest. He stated that Taylor’s magazines were kept in a “buttoned-down compartment” on Taylor’s belt; Wells testified that he did not see who removed the magazine that he later found on the ground from the compartment. Wells denied that he ever put a club or flashlight across the victim’s throat. He also denied seeing Officer Taylor hit the victim in the stomach. Wells explained that police officers are trained to use “pain compliance” if necessary to subdue individuals who resist arrest. Finally, he testified that Officer Taylor got pepper spray on his hands during the arrest.

Officer Robert James Taylor testified that he was working as a patrol officer on December 14, 1997. He recalled that he received a “domestic dispute standby, which is where a complainant will call in, and they want an officer to escort them back to their home, because they feel it’s unsafe or they want to get some property.” Taylor stated that in response to the dispatch, he drove to a gas station to meet Kelly Longmire. Taylor testified that Ms. Longmire had an icepack on her face and that she told him she had been assaulted by her husband that morning. Officer Taylor contacted Sergeant Taylor, his father and his supervisor at that time, who advised him to get a warrant for assault before escorting Kelly Longmire to her home. After obtaining the warrant, Officer Taylor and Officer Wells escorted Longmire to the apartment complex where she and her husband lived.

In the parking lot of the apartment complex, Officer Taylor encountered the victim. After the victim identified himself, Officer Taylor showed him the warrant for his arrest. According to Officer Taylor, the following events then took place: the victim “initially sort of looked at [Taylor],” and Taylor asked the victim to turn around and place his hands behind his back. The victim started to turn, but then said something to the effect of, “This is bullsh_t. I ain’t going.” Officer Taylor then tried to grab the victim’s hand, but the victim “started to jerk away.” Taylor grabbed the victim’s hand while Wells attempted to grab the victim’s other hand. During the scuffle, Taylor felt the victim grab his gun, which was in a holster at his waist. Taylor pivoted to prevent the victim from taking the gun and yelled to Wells that the victim had “grabbed ahold of [the] gun.” Taylor testified that he feared that the victim might try to take his pepper spray, which he also carried at his waist. When the victim did not let go of the gun, Officer Taylor struck the victim in the “upper right portion of the body” with his right hand. During the struggle, Officer Wells also struck the victim on the left side of the body. Taylor testified that at some point during the altercation, he activated his emergency button, but later cancelled the call for help. Taylor was eventually able to “break [the victim’s] hold” and push him onto the hood of Kelly Longmire’s car. However, according to Officer Taylor, the victim continued to resist arrest.

Officer Wells next sprayed the victim with pepper spray, also spraying Officer Taylor in the process, and the two officers were then able to handcuff the victim. They began to walk to the rear of Kelly Longmire’s car. However, Taylor testified that he lost his balance, started to fall to the ground, and put his hand out to brace himself, injuring his hand in the process. Taylor testified that the victim also fell with him, landing in a seated position, where he stayed. Officer Taylor reported that the victim was not bleeding and did not appear to be injured at this point. Taylor maintained that neither he nor Wells kicked, choked, or “beat” the victim in any way during the arrest.

Officer Taylor reported that other officers, including the Defendant, arrived at the scene. He stated that he was behind Officer Wells' vehicle attempting to wash pepper spray off of his hands and face when the Defendant arrived. He recalled that he heard "a commotion" while at Wells's car and walked back to Kelly Longmire's car. Taylor stated that as he turned to walk back towards the victim, he saw the Defendant "kick at [the victim]." He stated, "I didn't see the . . . end result of that action, but I did see him kick." He then saw the victim lying face-down on the ground with his hands behind his back. Officer Taylor reported that blood was flowing from the top of the victim's head down his face to his chin. Officer Taylor testified that he then called for a supervisor while Wells asked what had happened. Officer Taylor testified that after the victim's arrest, he was instructed to write a "Use of Force Report" detailing the incident.

Officer Taylor testified that he was later at a restaurant with the Defendant and other police officers when the Defendant commented about the case. According to Taylor, the Defendant "made a statement to the effect that if Toby Wells piked him off[,] . . . he said he was going to . . . 'f__k him up.'" He explained, "[A]round the Police Department, if they call you a piker, basically, you're a person who tells on another officer for doing something" Taylor testified that after the Defendant made the statement, another officer told the Defendant that he "needed to keep his mouth shut." Taylor also testified that Officer Wells made statements to other officers that Officer Taylor asked him "to cover for" the Defendant.

On cross-examination, Officer Taylor reported that he was terminated from the police force due to the incident involving the victim. However, Taylor stated that four and a half months after his termination from the Knoxville Police Department, his position was reinstated. Taylor testified that he subsequently filed a lawsuit against the City of Knoxville, which was pending at the time of trial.

Officer Taylor further testified that after the arrest of the victim, he charged the victim with resisting arrest. He admitted that in the warrant, he stated that the victim "slung officers [onto a] parked vehicle, and the officers and [the victim] fell onto the pavement causing injury to [the victim's] face and head and Officer Taylor's right hand." He admitted that he "made a mistake on the warrant" in describing how the injuries had actually occurred and credited the mistake to "a very stressful day."

Officer Ryan Flores of the Knoxville Police Department testified that in December 1997, he was living in and employed as the security guard for the apartment complex where Jack and Kelly Longmire lived. Flores recalled that on December 14, 1997, he walked out of his apartment in plain clothes to go to the store and "observed Officer Taylor and . . . a subject in some sort of a struggle." He testified that Officer Taylor had one arm around the victim's neck and was holding the victim's arm behind his back while trying to handcuff the victim. He stated that he walked towards the two men, but by the time he reached them, Officers Taylor and Wells had finished handcuffing the victim and were placing him on the ground. Flores stated that when he reached the victim, he noticed that the victim appeared to have been sprayed with pepper spray, but otherwise did not appear to be injured. He recalled that the victim was lying on his stomach behind Kelly Longmire's car.

Flores testified that he spoke to the arresting officers, who told him that they were executing a domestic violence warrant. He stated that he then attempted to speak to Kelly Longmire, whom he described as “frantic,” but she would not roll down the window of her car. Flores recalled that the Defendant soon arrived at the scene with the lights flashing on his police vehicle and stopped approximately ten feet behind Kelly Longmire’s car. Flores next heard the Defendant “yelling.” He testified that he heard the Defendant make statements “to the effect of, ‘You’re a wife beater; you want to fight a man; stand up[]’” Flores testified that he approached the Defendant, “grabbed a hold of him and . . . said, . . . ‘Just relax.’” He recalled that he then looked down at the victim and saw “the blood from . . . [the victim’s] head.” He reported that the victim was still lying on his stomach with his hands handcuffed behind his back at the time.

James J. Hellinger testified that he was working as a police officer for the Knoxville Police Department in 1997. He stated that on December 14, 1997, he responded to an emergency call from Officer Taylor. According to Hellinger, Taylor soon cancelled the call, but Hellinger proceeded to the scene despite the cancellation. Hellinger reported that when he arrived at the scene, Officer Taylor and Officer Wells were attempting to remove pepper spray from Taylor’s face. He recalled that the Defendant was also at the scene and that the lights and siren were still activated on the Defendant’s police vehicle. Hellinger stated that he asked Taylor and Wells where the suspect was, and they responded that he was at the car. He reported that when he reached the victim, the victim was lying on his side bleeding from his head. Hellinger testified that he first helped the victim into a sitting position, and a few minutes later, he helped the victim stand up. He reported that as he helped the victim stand, the victim, who was very agitated, said, “Why did you kick my ass?” Hellinger replied, “I don’t know what you’re talking about; I just got here.” Hellinger testified that the victim responded, “No, not you, that dark-headed officer over there,” referring to the Defendant.

Hellinger further testified that he and other officers went out for drinks at a restaurant after the incident. He reported that at the restaurant, the Defendant “made a statement that if he was singled out in this [incident,] he had a problem with Officer Wells and they were going to have a problem.” Hellinger stated, “We took that as a threat.”

On cross-examination, Officer Hellinger stated that Officers Taylor and Wells told him that after arresting the victim, they left him lying on the ground. He testified that they also told him that the victim was uninjured immediately after his arrest. In addition, Hellinger stated that the officers told him that the victim “took them to the ground,” thus injuring Officer Taylor’s wrist. Hellinger reported that he understood this to mean that both officers fell to the ground with the victim.

Sergeant Dick I. Taylor, patrol sergeant supervisor with the Knoxville Police Department and father of Officer Robert Taylor, testified that on December 14, 1997, he was called to the scene of the victim’s arrest. Sergeant Taylor testified that when he arrived, Officer Taylor, Officer Wells, and a “transport wagon” were already at the scene. Sergeant Taylor reported that the victim was sitting in the back of his wife’s vehicle with an injury to his head. He testified, “[The victim] was conscious. He was very angry. Blood had been dripping down his face and underneath his chin, and the injury was to the right side of his head.” Sergeant Taylor stated that he first spoke with Kelly

Longmire, who was “visibly upset,” and then attended to the victim’s injury. Sergeant Taylor explained that he had “an extensive background” in “medics,” which he used in treating the victim. He stated that he stopped the victim’s bleeding, cleaned his wound at the scene, and then sent the victim to the hospital in an ambulance. Sergeant Taylor testified that he next went into the victim’s apartment and spoke with Kelly Longmire, who indicated that the Defendant had kicked her husband.

Sergeant Taylor reported that he asked one of the officers to clean up blood on the ground where the victim had been injured. He testified that he did so because blood is a biohazard and because it would have been expensive and time-consuming to test the blood for DNA. He stated, “[B]lood is trace evidence . . . [that] leads [the police] to a party when we don’t know who the party is.” He explained that he did not find it necessary to photograph the blood stains “because the matter of the blood and [the victim’s] injuries were documented by medical experts.”

On cross-examination, Sergeant Taylor testified that Kelly Longmire told him that she saw Officer Taylor strike her husband and saw Officer Wells strike and kick her husband. He stated that officers are allowed to use some force to arrest subjects if necessary and explained, “That’s the officer’s defense of himself in the performance of his official duties.” Sergeant Taylor further testified that he detected an odor of alcohol about the victim when he arrived at the scene, and he reported that he saw a cold beer on the kitchen table inside the Longmires’ apartment. Taylor testified that from “all indications,” it appeared that the victim was a violent person on the day of his arrest. In addition, Taylor testified that the victim admitted he had fought the officers on the day of the arrest.

Sergeant Taylor testified that after the incident, he was fired from his position, but then “hired an attorney . . . and . . . won [his] job back.” He also stated that he had brought a lawsuit against the City of Knoxville and members of Internal Affairs, which was pending at the time of trial.

Officer Joe Austin, another employee of the Knoxville Police Department, testified that the Defendant told him that “he screwed up during the event that had taken place during the arrest of [the victim].” Austin stated that the Defendant also said, “Officer Wells better keep his mouth shut if he knows what’s good for him.” Austin testified that he reported these statements to his immediate supervisor.

Sergeant Roger White of the Knoxville Police Department testified that on December 14, 1997, he was supervising both Joe Austin and the Defendant. He stated that on the morning of December 14, he was relieved from duty for a short time so that he could sing in his church. White recalled that when he finished his performance and checked back in using his radio, he was called to the scene of the victim’s arrest. He stated that when he arrived, several officers were present, and he first spoke with Sergeant Taylor. White testified that he also spoke with Kelly Longmire, who “indicated that the dark-haired officer appeared to kick [the victim] who was concealed behind a vehicle to her.” White stated that “[t]he dark-haired officer was [the Defendant].”

White also testified that he filled out a Use of Force Report concerning the incident. In preparing his report, White spoke with the Defendant. White stated that the Defendant told him that there was no physical or verbal altercation between him and the victim and that he was involved only in handcuffing the victim. White testified that he was led to believe that the Defendant arrived at the scene before the victim was handcuffed and that the Defendant participated in the struggle with the victim.

White further testified that he received conflicting information from the officers involved in the victim's arrest. He stated that Officer Taylor initially told him on the day of the arrest that the victim had injured his head when they had all fallen to the ground. White stated that Officer Wells was present at the time Officer Taylor made the statement but did not offer any contradictory statements. Officer Taylor also told White that he had put his arm around the victim's neck during the arrest in what Taylor described as "a bear hug" in order to prevent the victim from reaching his gun. White testified, however, that on the following day, Officer Taylor wrote a statement for his Use of Force Report that conflicted with his first account of the arrest. According to White, both officers reported that the victim had been violent and aggressive towards them during the arrest and that they did not handcuff him until they all fell to the ground.

White stated that Kelly Longmire told him that it did not appear to her that the officers and her husband had fallen; White testified that she instead believed that her husband "had been pushed." Moreover, the victim reported to White that he was handcuffed before the Defendant arrived at the scene. The victim also told White at the hospital that he was knocked down, that he was kicked and verbally abused, and that one of the officers grabbed him by his hair and punched him in the face.

The Defendant testified on his own behalf at trial. He testified that on December 14, 1997, he began his shift as a patrol officer at 6:00 or 7:00 a.m. He stated that he received a "domestic standby" call and met other officers and Kelly Longmire at a gas station in west Knoxville. The Defendant testified that Kelly Longmire had been "badly beaten[]." He noticed that the right side of her face was "black and blue" and stated that it took "substantial force to cause that." He stated that the victim told them that she had received treatment for her injuries at the hospital the previous night and that she had reported the domestic abuse. The Defendant also testified that Mrs. Longmire "was in distress," and when the officers spoke to her in a loud tone, she "would be very awkward and kind of shy away from [them]." The Defendant reported that he explained to her "the circle of violence" and what options she had. The Defendant testified that after he spoke with Kelly Longmire, she requested a warrant against her husband for domestic violence. The Defendant relayed this information to Officer Taylor, who in turn called Sergeant Taylor. Sergeant Taylor soon arrived at the scene to speak to Mrs. Longmire, and Officer Taylor then transported Kelly Longmire to get a warrant. The Defendant reported that after Kelly Longmire left, he responded to another domestic violence call.

The Defendant testified that later that morning, he heard a "distress call" on his radio and then heard Officer Taylor's voice calling for help. He stated that he immediately activated his

emergency lights and siren and responded to the call. The Defendant maintained that he never heard Officer Taylor's cancellation of the emergency call.

The Defendant stated that when he reached the apartment complex where Kelly Longmire lived, he saw Officer Taylor and the victim in the parking lot. The Defendant maintained that the victim was in a crouched position to the left of Officer Taylor. He testified that Officer Taylor was "backing away" from the victim with his hands in front of his face and appeared to be "in distress." The Defendant stated, "[T]he demeanor of Officer Taylor suggested to me that he was in need of help. And the fact that this gentleman that was in front of me was in a crouched position and he appeared to me to be getting up. When I saw that, to me that was a threat to Officer Taylor."

The Defendant stated that he "immediately pulled in . . . , threw the vehicle into park, . . . got out of [the] vehicle and took [the victim] down." He testified that he ran to the victim as the victim was attempting to stand, "used a blocking maneuver and struck [the victim] in the back of his neck across the shoulder blade[,] forcing him back down to the ground." The Defendant stated that at this point, he and the victim "toppled on top of each other on the pavement," and he felt "hands at [his] crotch and gun belt area in front of [him]." The Defendant reported that he then "pushed [him]self off" of the victim and noticed for the first time that the victim was handcuffed. The Defendant testified, "At that point, I stood up, gained my composure, [and] looked at Officer Taylor to make sure that he was indeed . . . all right." He stated that the victim was "still on the ground vigorously fighting, using a lot of profanity, [and] attempting to spit on people." The Defendant reported that the victim next looked at him, said "a few choice words," and appeared to attempt to "kick [the Defendant's] feet." He stated that the victim "was trying to put [his feet] back together." The Defendant testified, "I didn't know if he was attempting to stand back up, [or] if he was trying to trip me" The Defendant testified that he therefore performed two "foot sweep[s]," pushing the victim's feet apart, to prevent the victim from standing up. He testified that he and the victim then "exchange[d] words" for thirty seconds to a minute until Officer Flores approached them and asked the Defendant to "just step back" and to "calm down."

The Defendant testified that when he next looked down at the victim, there appeared to be a "red streak on [the victim's] right temple," and the Defendant stated that he called an ambulance. The Defendant testified that while waiting for the ambulance to arrive, he and Officer Hellinger transported the victim to "the paddy wagon," which had arrived at the scene. The Defendant testified that as they began to move the victim, the victim "started screaming for a supervisor." He stated that the victim asked him several times for his name. The Defendant reported that he responded, "If you have a problem with me, my name is Szczepanowski."

The Defendant admitted that he "[m]ore than likely" used profanity towards the victim. He also admitted that he was angry about Kelly Longmire's injuries. However, he denied telling the victim to get onto his knees. He also denied ever kicking the victim's head. The Defendant further testified that did not fill out a Use of Force Report concerning the incident because he felt he did not use enough force towards the victim to warrant it. He explained that an officer may not contact certain parts of a subject's body during an arrest, but maintained that the areas where he struck the

victim were not areas where one could cause “imminent serious injury.” He also stated, “[T]o the best of my knowledge, I’ve never told anyone that I . . . screwed up. Now, thinking back . . . I have assessed the situation and thought that maybe I could have done better, but I’ve never revealed those thoughts to anybody.”

The Defendant further testified that he and other officers “got together [at a restaurant] and had a few drinks” approximately a week after the incident. He reported that as the night proceeded, Officer Taylor “began to act more . . . aggressively.” The Defendant admitted that he had “quite a bit to drink” that evening but stated that he did not “recall . . . making any threats toward another officer.” The Defendant reported that during the course of the evening, Officers Hellinger and Taylor “both made comments that Toby Wells was . . . telling other people in the department” that he planned to “blame [the Defendant] for” the injuries to the victim. The Defendant also stated that Officers Hellinger and Taylor both told the Defendant “that [he] needed to watch Officer Wells because he was kind of two-faced, that he had the tendency of fabricating the truth and when it benefitted him would tell that to certain people.” He testified that Officer Taylor also commented that the victim “got what he deserved.”

The Defendant testified that after the incident involving the victim, he was terminated from the Knoxville Police Department. He stated that he was terminated thirteen months after graduating from the police academy and reported that at the time he was released, five months remained on his “probation period.” He explained that during an officer’s probation period, the officer is an at-will employee and may be “terminated for any or for no reason whatsoever.”

On cross-examination, the Defendant stated that when he arrived at the scene of the victim’s arrest, he was not trying to discern whether the victim had a gun. He also stated that he believed that Officer Taylor specifically summoned his car when he called for emergency help. Finally, the Defendant testified that he had sued the City of Knoxville for his termination from the police force, but he later dismissed the lawsuit.

I. CONSTITUTIONALITY OF TENNESSEE CODE ANNOTATED § 39-16-402(a)(1)

The Defendant first contests the constitutionality of the statute governing his conviction. The Defendant was convicted of official misconduct. This crime is defined, in pertinent part, as follows: “A public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly . . . [c]ommits an act relating to the servant’s office or employment that constitutes an unauthorized exercise of official power” Tenn. Code Ann. § 39-16-402(a)(1). “‘Act’ means a bodily movement, whether voluntary or involuntary, and includes speech” *Id.* § 39-16-401(1). The Defendant argues that the phrase “unauthorized exercise of official power” is insufficiently defined so as to render the statute unconstitutionally vague.

Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the prohibited conduct. *See State v. Boyd*, 925 S.W.2d 237, 242-43 (Tenn. Crim. App. 1995). A statute is void for vagueness if it is not “sufficiently precise to put an

individual on notice of prohibited activities.” State v. Thomas, 635 S.W.2d 114, 116 (Tenn. 1982); see also State v. Wilkins, 655 S.W.2d 914, 915 (Tenn. 1983). A criminal statute “shall be construed according to the fair import of [its] terms” when determining if it is vague. Tenn. Code Ann. § 39-11-104. “Due process requires that a statute provide ‘fair warning’ and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed.” State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

Nevertheless, our supreme court has noted that “absolute precision in drafting prohibitory legislation is not required since prosecution could then easily be evaded by schemes and devices.” Wilkins, 655 S.W.2d at 916; see also Burkhart, 58 S.W.3d at 697. To determine whether a statute is unconstitutionally vague, a court should consider whether the statute’s prohibitions are not clearly defined and are thus susceptible to different interpretations regarding that which the statute actually proscribes. State v. Whitehead, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). A statute is not unconstitutionally vague “‘which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.’” Wilkins, 655 S.W.2d at 916 (quoting Donathan v. McMinn County, 213 S.W.2d 173, 176 (1948)). Appellate courts are charged with upholding the constitutionality of statutes wherever possible. State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990).

The statute in this case proscribes the “unauthorized exercise of official power” by a public servant acting within the scope of his or her employment. Tenn. Code Ann. § 39-16-402(a)(1). The public official must act intentionally or knowingly and with the “intent to obtain a benefit or to harm another.” Id. Thus, as applied to the case at bar, the statute prohibits any conduct which lies beyond the permissible limits of official power granted a police officer when making an arrest. We conclude that the statute is sufficiently clear and concise to provide adequate warning to police officers so that they might avoid the prohibited conduct. See Boyd, 925 S.W.2d at 242-43.

II. SUFFICIENCY OF THE EVIDENCE

The Defendant next challenges the sufficiency of the convicting evidence. When an accused challenges the sufficiency of the evidence, an appellate court’s standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions

concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

To support a conviction for official misconduct in this case, the State was required to prove beyond a reasonable doubt the following essential elements: (1) The defendant was a “public servant,” Tenn. Code Ann. § 39-16-402(a)(1); (2) the defendant committed an act relating to his office or employment that constituted an unauthorized exercise of his official power; (3) the defendant acted intentionally or knowingly; and (4) the defendant intended to obtain a benefit or to harm another. Id. A public servant is defined in pertinent part, as “a person elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of government.” Id. § 39-16-401(3).

Evidence was clearly presented that the Defendant was a police officer, and thus a “public servant,” id., at the time of the crime in this case. With regard to the remaining elements of the crime of official misconduct, we note the following evidence: The victim testified that the Defendant choked him and kicked his head while he was handcuffed. Kelly Longmire and officers present at the scene of the crime testified that it appeared that the Defendant kicked the victim after he was handcuffed. Officer Wells stated that he actually saw the Defendant kick the victim and described it as an “illegal” act because the victim was already handcuffed. Furthermore, those present at the scene testified that the Defendant was irate at the time of the incident and that he verbally confronted and threatened the victim during the incident. Thus, evidence was presented from which the jury could reasonably infer that the Defendant intentionally or knowingly attacked the victim while he was handcuffed, and evidence was presented from which the jury could reasonably infer that the Defendant acted with intent to harm the victim. We may not reweigh the jury’s findings of fact on appeal. Matthews, 805 S.W.2d at 779. We conclude that sufficient evidence was presented from which the jury could determine that the Defendant committed acts relating to his employment as a public servant which constituted “an unauthorized exercise of official power,” Tenn. Code Ann. § 39-16-402(a)(1), and we thus conclude that this issue is without merit.

III. BILL OF PARTICULARS AND ELECTION

The Defendant next argues that the trial court erred by failing to require the State to either describe in the bill of particulars the “act” constituting an “unauthorized exercise of official power” which he was accused of committing, or in the alternative, to elect a particular offense for which it was seeking a conviction. He contends that “these failures compromised the Defendant’s due process rights.”

The portion of the indictment concerning official misconduct, the crime of which the Defendant was convicted, provides as follows:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that JOHN PAUL SZCZEPANOWSKI, ALIAS, heretofore, to-wit: On or about the 14th day of December, 1997, in the State and County aforesaid, did unlawfully, feloniously, intentionally, and knowingly, and with intent to harm Jack Longmire, Jr., commit an act as a public servant relating to the servant's office and employment that constituted an unauthorized exercise of official power, in violation of T.C.A. 39-16-402, and against the peace and dignity of the State of Tennessee.

In response to a motion filed by the defense, the State filed a bill of particulars containing the following information:

Beginning at approximately 11:15 a.m. and continuing until approximately 12:00 noon on December 14, 1999, in the parking lot at Carlton Apartments, 4201 Crosby Road, Knoxville, Tennessee, the Defendant intentionally and knowingly

- (1) caused Jack Longmire, Jr., to reasonably fear imminent bodily injury;
- (2) committed acts as a public servant relating to the servant's office and employment that constituted an unauthorized exercise of official power, and
- (3) committed acts as a public servant under color of office and employment that subjected Jack Longmire, Jr., to unlawful mistreatment.

In addition, at a pre-trial hearing, counsel for the State clarified that the charge concerned "assaultive conduct."

A. BILL OF PARTICULARS

The Defendant maintains that the bill of particulars did not provide sufficient information concerning the charged offense. Tennessee Rule of Criminal Procedure 7(c) states that "[u]pon motion of the defendant the court may direct the filing of a bill of particulars so as to adequately identify the offense charged."

The purpose of the bill of particulars is to provide information about the details of the charge when necessary for a defendant to prepare his or her defense, to avoid prejudicial surprise at trial, and to enable the defendant to preserve a plea of double jeopardy. Information that may be required in the bill of particulars includes, but is not limited to, details as to the nature, time, date, or location of the offense.

State v. Speck, 944 S.W.2d 598, 600 (Tenn. 1997). "It is not the purpose of either the indictment or the bill of particulars to adequately prove the crime or to elect among alternative legal theories" for the crime. State v. Cattone, 968 S.W.2d 277, 280 (Tenn. 1998) (quoting State v. Joseph Cattone, 1997 Tenn. Crim. App. LEXIS 73, No. 03C01-9506-CR-00173, at *10-*11 (Tenn. Crim. App., Knoxville, Jan. 29, 1997)).

We conclude that the bill of particulars in this case provided sufficient details about the charge to enable the Defendant to prepare his defense, to avoid prejudicial surprise at trial, and to allow the Defendant to preserve a plea of double jeopardy. See Speck, 944 S.W.2d at 600. The bill of particulars included information concerning the date of the crime, its location, the approximate time at which the crime occurred, and general nature of the crime. However, even assuming that this information was not adequate to inform the Defendant of the crime charged, there is no indication in the record that the Defendant was misled by the State's bill of particulars. Furthermore, the Defendant has failed to show that he was prejudiced in his defense at trial. This issue is without merit.

B. ELECTION

The Defendant next argues that because the State did not specify in its bill of particulars the “act” underlying the charged offense, it should have been required to elect the particular instance of misconduct upon which it was relying to establish the offense of official misconduct. The Tennessee Supreme Court has “consistently held that the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim.” State v. Johnson, 53 S.W.3d 628, 630-31 (Tenn. 2001). The election requirement serves three purposes:

- (1) to enable the defendant to prepare for and defend against the specific charge(s);
- (2) to protect the defendant from double-jeopardy by individualization of the issue;
- and (3) to ensure unanimity of verdict so that the jury's verdict may not be a matter of choice between offenses – some jurors convicting of one offense and others of another offense.

State v. Hoxie, 963 S.W.2d 737, 741 (Tenn. 1998); Burlison v. State, 501 S.W.2d 801, 803 (Tenn. 1973). The supreme court has stated that the third rationale “addresses the most serious concern: the well-established right under our state constitution to a unanimous jury verdict before a criminal conviction is imposed.” State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993). Although the election requirement has been applied almost exclusively in sex crime cases, application of this requirement is not limited to such cases. State v. Jacob Dyck, No. E2001-00476-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 355, *8-*9 (Tenn. Crim. App., Knoxville, Apr. 22, 2002) (citing Johnson, 53 S.W.3d at 631).

In this case, the evidence did not establish discrete crimes, warranting application of the election requirement. Testimony differed to some extent as to what unauthorized acts the Defendant committed: The victim testified that the Defendant picked him up by the back of his sweatshirt, choking him in the process, while he was handcuffed. He also testified that the Defendant kicked him numerous times in the head after he was handcuffed. Officer Wells testified that he saw the Defendant kick the victim in the groin after the victim was handcuffed. Finally, other individuals present at the scene of the victim's arrest, including law enforcement officers and Kelly Longmire, did not actually witness an unauthorized act by the Defendant. However, even assuming that the jury found that each of these separate acts actually occurred, the acts occurred “‘quickly and virtually simultaneously,’” Johnson, 53 S.W.3d at 631 (quoting State v. Robert Derrick Johnson, 1999 Tenn. Crim. App. LEXIS 1335, No. M1998-00546-CCA-R3-CD, at *14-*15 (Tenn. Crim. App., Nashville,

Dec. 30, 1999)), and thus “coalesced into an ‘unmistakable single act,’ though separated by a few seconds and feet.” State v. Pelayo, 881 S.W.2d 7, 13 (Tenn. Crim. App. 1994). The Tennessee Supreme Court has stated that in such circumstances, “the General Assembly did not intend for a defendant to be punished separately ‘for each blow or injury.’” Johnson, 53 S.W.3d at 634 (quoting Pelayo, 881 S.W.2d at 13). This conclusion also fulfills the third rationale for the election requirement, that of jury unanimity: Our supreme court, in a sexual offense case, has stated that “so long as the jurors agreed that the defendant engaged in sexual conduct on the date charged, the defendant was afforded his constitutional right to juror unanimity. This is true even though some of the jurors may have based their finding on one touching, and others may have based their finding on the other touching.” Id. at 633. Likewise, in this case, the Defendant was afforded his right to juror unanimity, even though some jurors may have based their finding on one act, while others may have based their finding on another act. We therefore conclude that in this case, election was not necessary.

IV. JURY INSTRUCTIONS

Finally, the Defendant argues that the trial court erred by failing to instruct the jury that “a police officer may engage in an act which could otherwise result in force or harm against an accused.” More specifically, he cites Tennessee Code Annotated § 38-3-108, concerning an officer’s duty to arrest, which provides as follows:

It is the duty of all peace officers who know or have reason to suspect any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding, or killing another person, or of otherwise breaking the peace, to arrest such person forthwith, and take such person before the court of general sessions.

The Defendant also cites Tennessee Code Annotated § 38-3-111, which states that an officer who knowingly fails to make an arrest as instructed by the foregoing statute commits a Class C misdemeanor. In addition, the Defendant argues that the trial court should have instructed the jury on the defense of necessity. See Tenn. Code Ann. § 39-11-609. Finally, the Defendant contends that the trial court should have instructed the jury that a law enforcement officer may use force, including deadly force in certain situations, if warranted, to “accomplish the arrest of an individual suspected of a criminal act who resists or flees from the arrest.” Id. § 39-11-620.

At the close of proof, the trial court asked the parties whether they had “[a]ny problem” with the proposed jury instructions. Counsel for the defense requested an instruction on the duty of an officer to arrest and the penalty for failure to do so. See id. §§ 38-3-108, 38-3-111. The trial court considered the request, reading both statutes, but concluded that neither statute was “applicable to this set of circumstances.” The court pointed out that the duty to arrest applied in situations where the suspect was armed. See id. § 38-3-108. Defense counsel then argued “a person’s arms, head or legs can be weapons.” However, the trial court responded that it could not “in good conscience instruct that statute.”

“[A] defendant has a constitutional right to a correct and complete charge of the law.” State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). However, when jury instructions are full, fair, and accurate statements of the law, a trial court is not required to provide special instructions. State v.

Mann, 959 S.W.2d 503, 521 (Tenn. 1997); State v. Kelley, 683 S.W.2d 1, 6 (Tenn. Crim. App. 1984); State v. Chestnut, 643 S.W.2d 343, 352 (Tenn. Crim. App. 1982). It is not error for a trial court to deny a request for special instructions when the court's instructions on a matter are proper. State v. Vann, 976 S.W.2d 93, 114 (Tenn. 1998).

Like the trial court, we conclude that an instruction on an officer's duty to arrest and the penalty for failure to arrest are not warranted in this case. With the exception of the Defendant, all witnesses involved testified that the victim was handcuffed and subdued at the time the Defendant arrived at the scene. The Defendant testified that when he arrived at the scene, he saw the victim acting in a threatening manner toward Officer Taylor. The Defendant's conduct from that point on could be viewed by the jury as an attempt by the Defendant to arrest or assist in an arrest of the victim. However, there was no testimony presented at trial indicating that the victim was armed at any time. Therefore, we conclude that it was not error for the trial court to decline to instruct the jury on an officer's statutory duty to arrest and the penalty for failure to do so. See Tenn. Code Ann. § 38-3-108, 38-3-111.

We further note that the Defendant did not request instructions on either the defense of necessity or the use of deadly force. The Tennessee Supreme Court has stated that “[q]uestions concerning the instructions are generally deemed to be waived in the absence of objection or special request, unless they contain plain error.” State v. Cravens, 764 S.W.2d 754, 757 (Tenn. 1989) (emphasis in original). We conclude that the trial court's decision with regard to these two instructions did not constitute plain error. The trial court concluded, and we agree, that these instructions were not warranted based on the evidence presented at trial.

Accordingly, we AFFIRM the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE